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Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOB MOZERT, *et al.*,
Petitioners,

v.

HAWKINS COUNTY PUBLIC SCHOOLS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICI CURIAE OF CHRISTIAN LEGAL SOCIETY AND THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the State burdens the free exercise of religion and the right of parents to direct the moral upbringing of their children when public school officials suspend children for refusal to read material that violates their parents' and their own sincerely held religious beliefs.

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as some eight million Catholic students attend public schools in this country.[4] It is an unfortunate fact that the education provided Catholic children in public schools sometimes undermines both parental authority and religious belief.

The Catholic League firmly believes that it is unconstitutional for a state school to require children, despite the objections of their parents, to study material which the parents sincerely believe undermines the religious beliefs of the children. The League therefore supports the judgment of the district court granting the parents the right to exempt their children from studying religiously objectionable material and opposes the contrary decision of the court of appeals.

The Christian Legal Society is a non-profit professional association of 4,000 judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the State for religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual citizen's respect for, and allegiance to, our constitutional government.

Amici have been involved in cases involving the right of parents to exempt their children from curricular material that violates their religious beliefs. The Christian Legal Society assisted the lawyers representing two students who refused to read a book that contained a detailed description of a prostitute's work, as well as profanity and blasphemy. The school board denied the students' request for an alternative assignment and threatened to

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[4] This statistic is based on an estimate of 900,000 children baptized as Catholics each year (hence 10,800,000 total Catholic children in grades one through twelve), with 2,800,000 children attending Catholic elementary and high schools. Of the 8,000,000 children in public school, half are registered in programs of Catholic instruction outside the public school. *See generally The Official Catholic Directory 1986* (General Summary); 1986 *Catholic Almanac* 440-41.

withhold their diplomas. After the students threatened suit, the school district agreed to allow them to graduate. The League represented a student who was denied her diploma for three years, after her parents removed her from a class that contained material to which they objected on religious grounds. After a suit was filed in federal court, the school district awarded the diploma. *Bender* v. *School District of Menomonee Falls*, Civ. 85-C-0811 (E.D.Wis. filed May 28, 1985).

The letters from the parties consenting to the filing of this brief are submitted herewith to the clerk pursuant to Rule 36.1.

SUMMARY OF ARGUMENT

Contrary to the decision below, a burden exists on the First and Fourteenth Amendment rights of these parents and their children in four distinct, but interrelated, ways. First, the State has forced these parents and schoolchildren to forfeit a public education, an important governmental benefit, or disobey the precepts of their religion. See *Hobbie v. Unemployment Appeals Commission*, 480 U.S. ——, 107 S. Ct. 1046 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). Second, the State has interfered with the transmission of parental values, a fundamental liberty protected by the Fourteenth Amendment and, when the values at stake are religious, by the First Amendment. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Third, the State has violated the absolute right of freedom of belief, including the individual's right to be free from coercive state influence in shaping his beliefs and ideas. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Fourth, contrary to the explicit assumption of the court below, the record indicates that the State expected children to read *aloud* materials that violated their religious beliefs, burdening

both their freedom of religion and freedom of expression. See *Barnette, supra*; *Wooley v. Maynard*, 430 U.S. 705 (1977). The existence of private schools does not relieve public school officials of their responsibility to respect the religious values of the parents and children in their community.

The decision below upsets the equilibrium generally established in the lower courts that controversial curricular material to which parents express religious objections should be accompanied by the option of performing alternative assignments. By upsetting this balance, the decision below will affect the rights of parents nationwide and increase divisiveness in communities, by forcing dissenting parents to seek to control public education or abandon it entirely.

ARGUMENT

I. WHEN THE STATE SUSPENDS SCHOOLCHILDREN FOR REFUSAL TO READ MATERIAL THAT VIOLATES THEIR PARENTS' AND THEIR OWN RELIGIOUS BELIEFS, THE STATE BURDENS THE FREE EXERCISE OF RELIGION AND THE RIGHT OF PARENTS TO DIRECT THE RELIGIOUS VALUES OF THEIR CHILDREN.

The issue presented by this case appears on first impression to be whether parents with overzealous religious convictions should be allowed to legally object to a portion of the public school curriculum. A closer reading reveals a case of valid constitutional dimensions, namely, insensitivity of the State to its obligation to reasonably accommodate parents concerned about the preservation of religious values in their young children, when the State cannot justify its coercive requirements by a compelling state interest unachievable by less drastic means.

The facts of this case are important for what is not at issue. The parties stipulated that the religious beliefs of the parents and children in this case were sincerely held. The parties further stipulated that the reading of the Holt, Rinehart and Winston basal reading series offends

those sincerely held religious beliefs. The record is clear that five children were suspended from school for a total of 13 days each, and two children were suspended for a total of 23 days each, for refusing to read from the Holt readers. Faced with continued suspensions, several of the parents finally placed their children in private schools; some children were sent to public schools in a neighboring school district, where the parents paid tuition; some children were taught at home. However, one student remained in the Hawkins County School District, because his parents were financially unable to pay for, and were physically unable to transport him to, other schools.[5] School authorities told a first grader to leave the system, despite the fact that her parents, who were objecting to her brother's reader, were not objecting to her reader. The record also indicates that at least one of the students received an "F" in *oral* reading, for refusing to read *aloud* from the Holt readers.[6] Despite these facts, the court below held that no burden had been placed on the parents' and children's religious beliefs.

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[5] The record seems to indicate that the teacher of the student continued to accommodate to some degree his religious beliefs, despite the school board policy prohibiting any accommodation.

[6] The court below states that "there is no proof in the record that any plaintiff student was required to engage in role play . . . [or] read aloud." Petition Appendix (hereinafter "Pet. App.") at 16a; *but see, id.* at 12a. To the contrary, Vicky Frost testified that her daughter Sarah Frost was given an "F" in *oral* reading, for refusing to read the Holt readers aloud. Joint Appendix, Vol. 3 at 506. The trial court did not mention this specifically in its decision, since it was not necessary to its decision. Given that the lynchpin of the appellate decision below seems to rest on the mistaken belief that the plaintiffs were not required to read aloud materials that offended their religious beliefs, at a minimum, the case should be remanded to the district court for clarification of this point. A remand is not necessary if, as *amici* argue, a burden exists apart from a requirement on the children to read aloud from the Holt readers.

A. The State Has Burdened The Free Exercise Rights Of The Parents And Their Children By Forcing Them Either To Forfeit A Public Education, An Important Governmental Benefit, Or To Abandon Their Religious Convictions.

Although public education is not a federal constitutional right, *Plyler v. Doe*, 457 U.S. 202 (1982), it is an extremely important benefit provided by the State to all citizens who wish to attend its schools. See *id.* at 221-23; *Yoder*, 406 U.S. at 213 ("Providing public schools ranks at the very apex of the function of a state."); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *see also*, Tenn. Const. art. 11, sec. 12.

On penalty of suspension, the Hawkins County School District requires children to read the Holt readers, despite their parents' determinations that the repetitious presentation of certain themes in the Holt readers violates their religious convictions. Contrary to the decision below, *Sherbert v. Verner*, 374 U.S. 398 (1963), and its progeny control the analysis of the burden in this case. As this Court has said:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Board, 450 U.S. at 717-18 (1981). *Accord, Hobbie v. Unemployment Appeals Commission*, 107 S. Ct. at 1048-52 (1987). The court below distinguished *Sherbert*, *Thomas*, and *Hobbie* from the instant case on the mistaken assumption that the governmental compulsion to engage in conduct proscribed by one's religious convictions was missing in this case, because Hawkins County school officials did nothing more than force

children to read material that violated their religious convictions.

However, mere statement of the reasoning of the court below shows its fallacy. Reading is more than "mere exposure"; " 'reading requires an affirmative act.' " *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 128 (1973), *quoting*, *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (1968), *cert. denied*, 396 U.S. 842 (1969). See page 15, *infra*. The Hawkins County school officials have fulfilled the *Sherbert* elements of burden by compelling, on pain of suspension, conduct proscribed by the religious beliefs of these parents and their children, *i.e.*, reading material that repeatedly contradicts the young children's religious beliefs.[7]

Furthermore, the state compulsion against these parents and children is more egregious than the compulsion found in *Sherbert*, *Thomas*, and *Hobbie*. For in those cases, private employers forced the direct choice between private jobs and religious beliefs, with the State placing only an indirect burden on the individuals' religious conduct. In contrast, in this case, the State itself has placed a direct burden on the religious beliefs of the parents and their children, by forcing the direct choice between public education and religious beliefs.

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[7] As the district court decision, Pet. App. at 67a, and Judge Boggs' concurring opinion, Pet. App. 32a-36a, underscore, the parents and children are willing to accept occasional exposure to offensive material but cannot accept the repetition in the Holt reader of themes that violate their religious beliefs. The court below redefined the religious beliefs of the parents to suggest a situation in which they would not tolerate any discrepancy between the curriculum and their beliefs. Although these parents' objections sometimes seem tenuous, the court below decided a hypothetical case rather than the case that was actually before it.

B. The State Has Burdened The Right Of These Parents To Direct The Education And Religious Values Of Their Children, By Requiring Their Children To Read The Holt Readers, Despite The Parents' Sincerely Held Religious Belief That The Holt Readers Will Negatively Influence Their Young Children's Religious Values.

Few rights can be as important to parents as the right to direct the religious values and education of their children, as this Court repeatedly has affirmed. *Yoder*, 406 U.S. at 213-14 ("The values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."); *Pierce*, 268 U.S. at 534 (affirming "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 399 (the Fourteenth Amendment protects certain fundamental liberties, including "the right . . . [to] establish a home and bring up children, to worship God according to the dictates of his own conscience"). The parental right to direct the education of one's children is a fundamental liberty protected by the Fourteenth Amendment, which derives additional protection from the First Amendment guarantees of free exercise of religion and freedom of expression when religious values are at stake.

Under our system of liberties, the family is the primary vehicle for the preservation and transmission of values from one generation to the next generation. "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion) (footnote omitted).

The Court has long recognized that the transmission of familial values is a vital, if delicate, function to be protected from state intrusion. "[B]y cultivating and trans-

mitting shared ideals and beliefs", families "foster diversity and act as critical buffers between the individual and the power of the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). Indeed, the right of parents to direct the child's values, which includes protecting the child from exposure to material that the parents consider harmful, has justified state action limiting expression that otherwise would have been protected by the First Amendment. See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749 (1978) (parental interest in protecting children from indecent language); *Rowan v. Post Office*, 397 U.S. 728, 738 (1970) (parental interest in protecting children from erotic mail); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (parental interest in protecting children from indecent material).[8]

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[8] Strong practical considerations underly this commitment to the parental right to direct the education and values of their children. First, the preservation and transmission of parental values is integral to many parents' decisions to marry and bear children. Probably the greatest challenge and most satisfaction for parents derive from seeing their children internalize the parental values as their own. Second, development of healthy children is advanced by protection of the parental right to direct their education and religious values. Our legal system presumes that parents desire to act in the best interest of their children. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). The parent has the unique opportunity to observe the child on a long-term and intimate basis, thereby acquiring special knowledge of the child's psychological, emotional and spiritual needs, which persons outside the family are less able to appreciate. Furthermore, the family provides a setting in which the child can develop his value system at a pace appropriate to him individually, without being subjected to societal pressure that could overwhelm him without the buffer of the family. See *Roberts*, 468 U.S. at 619. Third, protection of the parental right to direct the child's education and religious values strengthens the institution of the family by reinforcing parents' feelings of adequacy to nurture and socialize their children and provide for their basic needs. Finally, society benefits from the pluralism and diversity that results from protection of the parental right to direct the child's education and religious values. See Colby, *When the Family Does Not Pray Together: Religious Rights Within the Family*, 5 Harvard Journal of Law and Public Policy 39, 62-66 (1982).

As in this case, the landmark cases affirming the right of parents to direct the education and religious values of their children have arisen out of disputes between parents and state educational officials over children's participation in curricular content that violated the religious beliefs of the parents and the children. In *Yoder*, the Court required the State to exempt from the compulsory attendance laws children in ninth and tenth grades, when their parents for religious reasons did not want their children exposed to a curriculum that possibly would foster attitudes in the children incompatible with the religious beliefs of the parents. 406 U.S. at 211-12. In *Barnette, supra*, the Court required a partial exemption from the public school curriculum for children of religious dissenters who objected to their children saluting the flag. As the Establishment Clause decisions affirm, parents send their children to public school with the expectation that their religious beliefs will not be coercively influenced by the public school curriculum. *See, e.g., Edwards v. Aguillard*, 107 S. Ct. 2573, 2577 (1987).

Despite weighty justifications for the educational programs at issue, the parental rights cases consistently have subordinated the State's educational objectives to the right of parents to direct the education and religious values of the child. See *Meyer*, 262 U.S. at 401 (State prohibited teaching modern foreign language to children, arguing that immigrant children were not learning English and would, therefore, be unable to participate in civic duties); *Pierce*, 268 U.S. at 524-28 (State required all children to attend public schools, citing the rise in juvenile crime, the rise in religious divisiveness possibly attributable to "the separation of children along religious lines during the susceptible years of their lives," the need of immigrant children to learn English and democratic ideals, and a fear of future internal dissensions and foreign dangers); *Barnette*, 319 U.S. at 625 (State required the flag salute to instill patriotism during war); *Yoder*, 406 U.S. at 221 (State required universal compulsory education to prepare its future citizens to participate in

its political system and to be self-sufficient). Hawkins County's asserted interest in all children being forced to read from the Holt readers pales in comparison to these more substantial, yet insufficiently compelling, state interests.

The interest asserted below by Hawkins County school officials, i.e., exposing all children to values that the State believes important and that it fears parents may not choose to teach their children, has been asserted, and rejected, in other parental rights cases. Brief of Appellants Hawkins County Public Schools, in Court of Appeals, at 39. Despite persistent efforts by the State to standardize its diverse citizenry through various educational programs, this Court repeatedly has protected parents and their children against state efforts that, intentionally or unintentionally, might undermine the family's religious values. Standardization is not to be the goal or result of the American educational system. See *Meyer*, 262 U.S. at 402 (State officials are not allowed to educate the young "in order to submerge the individual and develop ideal citizens"). The Court in *Barnette* disparaged the State's interest in compelled uniformity in the public schools:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing . . . . Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.

319 U.S. at 640-42.

By failing to recognize any burden on the right of parents to protect their children's religious values, the court below undermined this fundamental liberty in favor of the coerced uniformity repeatedly disavowed by this Court.

C. The State Has Burdened The Right Of The Individual To Be Free From Coercive State Influence On The Individual's Beliefs.

The freedom to believe is absolute. *Cantwell v. Connecticut*, 310 U.S. at 303. The State may not "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control". *Wooley v. Maynard*, 430 U.S. at 715, *quoting*, *Barnette*, 319 U.S. at 642.

Even if compelled reading of repetitive themes offensive to children's religious beliefs were "mere exposure" to ideas, it would constitute a burden on the freedom of the individual to shape his own beliefs free from coercive state influence. As this Court has made abundantly clear, the State has no power to coercively influence the ideas of the individual. "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State". *Abood v. Detroit Board of Education*, 431 U.S. at 235, *citing*, *Cantwell v. Connecticut*, 310 U.S. at 303-304. See *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1968) ("State . . . control [of] the moral content of a person's thoughts . . . is wholly inconsistent with the philosophy of the First Amendment").

This Court has recognized the parental interest in protecting the child from exposure to materials that could interfere with the values that the parent is teaching the child. See *Pacifica*, 438 U.S. at 749; *Rowan*, 397 U.S. at 738; *Ginsberg*, 390 U.S. at 639. In those cases, the sender of the offensive material was a private entity;

how much more must the right not to receive offensive ideas be protected when the sender is the State.

This parental interest in protecting the child from state interference with familial values has been protected in the public education context when the beliefs potentially affected are religious beliefs of children. See *Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) ("the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the state"); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). In *Yoder*, the parents' basic concern was to protect their children's religious values from exposure to ideas in the public school curriculum that might influence their children's religious beliefs. *Yoder*, 406 U.S. at 211-12.[9] The heart of the *Barnette* decision is that public education officials are not free to influence children through curricular material to which the children and their parents have religious objections:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Barnette, 319 U.S. at 642.

Protection against coercive state ideological input is particularly important when the individual is a "captive audience" of the State's message, who cannot avoid the message "simply by averting [his] eyes", *Cohen v. California*, 403 U.S. 15, 21 (1971), or throwing the material in the wastebasket, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 542 (1980). In the public education context, the compulsory attendance laws

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[9] *Yoder* cannot be limited to protection only of Amish beliefs without violating the Establishment Clause guarantee that all religious faiths have equal weight before the government. Nor can it stand for the proposition that religious objections are protected only if the parents want a complete opt-out of public schools, since *Barnette* teaches that an opt-out of one part of the curriculum is not only permissible but required.

dissenters out of the public schools, citing its interest in homogeneity, and uses the existence of private schools to rationalize its intolerance of the religious views of these parents and students. While the existence of private education is an important constitutional right, private schools do not exist to relieve public education officials of their responsibility to respect *in practice* the religious beliefs of all in the community.[10]

Students holding dissenting religious values are not to be "ghettoized" or forced into private schools against their choice. This would send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Wallace v. Jaffree*, 472 U.S. at 69 (1985) (O'Connor, J., concurring).[11]

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[10] Curiously, the court below relied heavily on the existence of private schools to support its conclusion that no burden existed on the rights of the parents or students. The existence of alternative education is irrelevant to the issue of whether a burden exists but is a consideration only after the State has demonstrated a compelling state interest in forcing the children to read the Holt series. Then the existence of private schools becomes relevant in determining the least restrictive means of accomplishing the State's compelling interest.

[11] As this case demonstrates, for many parents, the local public schools have distinct advantages over private or home schooling. The parents in this case incurred expenses of over $50,000 in sending their children to alternative schools. At least one student's family could not financially afford, or physically transport the student to, an alternative school. Public schools often offer a greater variety of courses, extracurricular activities, and educational resources. No private school in general accord with the parents' religious views may exist in a community; and homeschooling requires one parent to be home during the day, which excludes families where the parent is single or both parents hold jobs outside of the home.

II. THE DECISION BELOW HAS NATIONAL IMPLICATIONS FOR PARENTAL INVOLVEMENT IN PUBLIC EDUCATION.

Parental involvement in the public schools has always been viewed as not only a right but a positive good for the educational system. See United States Department of Education, *What Works* 19 (1986) (citing several studies emphasizing the importance of parental involvement). Unfortunately, some school officials prefer absolute control to shared responsibility and decisionmaking. *Cf.*, *Barnette*, 319 U.S. at 638 ("There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution").

The courts have long recognized the value of allowing students with religious objections to curricular material to be exempted from material that violates their religious beliefs and allowed to study alternative material.[12] The decision below upsets this equilibrium at a time when both schools and individual teachers, under claims of

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[12] *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972) (high school student who objects to R.O.T.C. training on religious grounds must be exempted); *Moody v. Cronin*, 484 F. Supp. 270 (C.D.Ill. 1979) (student who objected on religious grounds to participation in mandatory coeducational physical education class, because of "immodest" attire worn by other students, exempted). *See also, Grove v. Mead*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985) (student could not challenge use of book in the curriculum to which she had religious objections, when she had been exempted from reading it); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (holiday curricular recognition of religious holidays upheld where students allowed exemption, stating that forced participation would violate the Free Exercise Clause); *Wright v. Houston Indep. Sch. Dist.*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) (curricular inclusion of evolutionary theory upheld with opt-out provision); *Roman v. Appleby*, 558 F. Supp. 449 (E.D. Pa. 1983) (rejecting suit alleging that guidance counselor undermined student's religious beliefs, noting that student was not forced to attend sessions); *Smith v. Ricci*, 89 N.J. 514, 446 A.2d 501 (N.J.), *appeal dismissed sub nom., Smith v. Brandt*, 459 U.S. 962 (1982) (state regulation requiring sex education in elementary and secondary grades that allows students to be excused

academic freedom, increasingly are including controversial material in the curriculum.[13] Although the parents' concerns in this case may seem unusual to some, the holding that there is no burden will affect situations in which the cause for parental objections is obvious. As a practical matter, the decision below stands for the proposition that there is "no limitation on [the school board's] power to require any curriculum, no matter how offensive or one-sided, and to expel those who will not study it, so long as it does not violate the Establishment Clause." Pet. App. at 31a (Boggs, J., concurring.)

The constitutional right of exemption serves as a practical balance of interests, when increasingly it is recognized that the issue is not whether education will be value-laden but whose values public education will reflect.

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from specific lessons that violate their parents' religious beliefs upheld); *Citizens for Parental Rights v. San Mateo County Board of Education*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1st Dist., 1975), *appeal dismissed*, 425 U.S. 908 (1976) (sex education programs with parental notification and excusal provisions upheld); *Hobolth v. Greenway*, 52 Mich. App. 682, 218 N.W. 2d 98 (Mich. 1974) (state statute permitting sex education but requiring excusal upheld); *Medieros v. Kiyosaki*, 52 Hawaii 436, 478 P.2d 314 (Haw. 1970) (elementary sex education program that allowed excusal upheld). *Contra Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974) (school need not excuse children from classes in which audio-visual material and "wordly music" was used, despite parents' religious objections).

[13] Controversial materials and methods are not uncommon in the public school classroom. See pages 2-3, *supra; see also, e.g., Dean v. Timpson Indep. School Dist.*, 486 F. Supp. 302 (E.D.Tex. 1979) (teacher's classroom use of survey regarding sexual attitudes with opt-out allowed protected); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher cannot be dismissed for assigning story that could be construed as condoning killing the elderly and free sex, despite parental complaints); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) (teacher may not be punished for the content of his classroom discussions, including discussion of profane words, or his selection of materials for assignment, if he can demonstrate an educational purpose despite parental complaints); "People", *Education Week*, December 9, 1987, at 3 (elementary school principal's proposal to boost student performance by playing subliminal messages over the public-address system dropped after parental objection).

Assuming, as *amici* do, that parents do not have a constitutional right to ask a court to bar the general use of curricular material that is facially neutral *vis a vis* various religions, and given the academic freedom of teachers to use controversial material in the classroom, the right of exemption becomes a safety valve for avoiding divisive battles for control of public education. This is particularly true in this case, where the record shows that accommodation of these parents and their children worked before the school board adopted its "get tough" policy.

While asserting a compelling state interest in teaching tolerance of all religious views, the school officials have failed to exhibit tolerance in their own classrooms, overreacting instead with a heavyhandedness that violates the core constitutional values of free exercise of religion, individual autonomy in the intellect and spirit, and the right of parents to protect the religious values of their children.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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